(16)

No. 01-46

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY

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QUESTION PRESENTED

Does sovereign immunity bar a complaint filed with a federal administrative agency by a private party seeking monetary and injunctive relief against an unconsenting State pursuant to a statute enacted under Congress' Article I powers?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent South Carolina State Ports Authority.

INTEREST OF *AMICI CURIAE*

The States have an interest in the question this case presents for two reasons. First, several States have agencies similarly situated to the South Carolina State Ports Authority that engage in port-related activities which give rise to the same types of dispute at issue in this case arising under the Shipping Act of 1984. Second, and more broadly, all States have a direct interest in the central question posed in this case of whether their immunity from suit by a private party extends to federal administrative proceedings that Congress has authorized under its Article I powers.

SUMMARY OF ARGUMENT

Fundamental principles of sovereign immunity bar a private litigant from filing a complaint with a federal administrative agency seeking any relief from the States under the Shipping Act or any other legislation enacted pursuant to Congress' Article I powers. That relief is barred because these immunity principles extend to judicial actions and any other proceeding in which a private party seeks relief against an unconsenting State under Article I legislation. This Court previously held that these principles are not confined by the literal terms of the Eleventh Amendment to cases brought in federal court but, rather, that they also apply to state court cases because the States did not relinquish this key aspect of their sovereignty when they ratified the Constitution, and that sovereignty would be violated by a suit brought against the States in their own courts. As this case illustrates, complaints filed by private parties against the States with federal administrative agencies such as the Federal Maritime Commission are at least as much an affront to the States' dignity because they subject the States to a compulsory process without their consent and thus represent the precise "anomalous and

unheard-of proceedings or suits" that Alexander Hamilton and others assured the States they would not be subjected to by ratifying the Constitution.

Such complaints arguably subject the States to an even greater indignity in light of Congress' undisputed lack of authority under Article I to abrogate the States' immunity in any judicial proceeding. It makes little sense to adopt the views of the leading Framers that it is beyond Congress' Article I powers to abrogate unilaterally the States' immunity from claims brought by private parties in federal or state court, and yet to cast those views aside when the same Article I claims are brought against the States by the same private parties in a forum established by the same Article I powers. The States' immunity is not constrained by the physical contours of the courthouse but retains the same vigor and strength in any proceeding in which a private party seeks relief under Article I legislation against a State that does not consent to be subjected to such a proceeding.

The absence of that consent does not render such legislation unenforceable against the States, which have been deemed to consent to actions brought against them by the United States. Such consent is not transferrable to a private party, however, which may not, as the Federal Maritime Commission and the United States argue, file a complaint against a State with the Commission as a substitute for an agency-initiated investigation. No consent exists in this case because the coercive proceeding in which the South Carolina State Ports Authority was forced to participate was initiated by a private party complaint and not by the federal government, which did not exercise any political responsibility for the action taken against the Authority.

Even had such responsibility been exercised, immunity would still bar the request for reparations made in this case. The Federal Maritime Commission has no authority to seek judicial enforcement of that relief. Rather, reparations can be sought and enforced only by a private party. Thus, as the United States concedes, the Eleventh Amendment would prohibit a federal court from ordering the Authority to pay damages to such a litigant. The same immunity principles that the Amendment exemplifies prohibit the Commission from ordering a State to dip into its treasury and pay reparations to a private party.

In holding that Congress does not have the authority to coerce the States' participation in a federal administrative proceeding and usurp an inviolable element of State independence and integrity, the court of appeals reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the States. That decision should accordingly be affirmed.

ARGUMENT

SOVEREIGN IMMUNITY APPLIES IN ANY PROCEEDING IN WHICH A PRIVATE PARTY SEEKS RELIEF AGAINST AN UNCONSENTING STATE PURSUANT TO ARTICLE I LEGISLATION.

A. The States Retained Their Immunity From Claims Filed By Private Parties In Any Forum When They Ratified The Constitution.

Although the Shipping Act of 1984 appears to be a valid exercise of Congress' Article I powers because of its seemingly sufficient connection with "broad categories of activities that Congress may regulate under its commerce power," *United States v. Morrison*, 529 U.S. 598, 608 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558

(1995)), no serious claim can be made that the Act can be defended as "appropriate legislation" under Section 5 of the Fourteenth Amendment. Like the law invalidated in *Morrison*, the Shipping Act "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor," 529 U.S. at 626, but at "common carriers," 46 U.S.C. app. 1702(8), "maritime terminal operators," *id.*, § 1702(15), "persons," *id.*, § 1702(20), and other entities, none of which expressly include the States.[1]

Rather than constitute an effort by Congress aimed at the "remediation or prevention of constitutional violations," *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 672 (1999), the Shipping Act represents, as the Federal Maritime Commission in this case observed below, "Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce." Appendix to Petition for Writ of

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[1] While this Court has stated that the Shipping Act does "not authorize suits against the States by private parties," *Vermont Agency of Natural Resources v. United States ex rel. Steven*, 529 U.S. 765, 786 n.17 (2000), the court of appeals in this case decided only the question whether sovereign immunity bars a Shipping Act-based complaint filed by a private party against the States with the Federal Maritime Commission. The court did not address "the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent)." *Id.* at 779 (emphasis in original). The *Amici* States also do not address that question, which was not included in the Federal Maritime Commission's petition for a writ of certiorari.

Certiorari ("Pet. App.") 33a. "These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation [abrogating the States' immunity] after *Seminole Tribe* [*of Florida v. Florida*, 517 U.S. 44 (1996)]." *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 (1999). Rather, as made clear by that case and several others decided since then, Congress has no authority under the Shipping Act or any other Article I legislation to abrogate unilaterally the States' immunity from claims brought by a private party.

The position of the United States and the Federal Maritime Commission that this proceeding is not barred by immunity is flawed because it is based on an overly restrictive interpretation of these decisions and the doctrine of sovereign immunity. As this Court has stated, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 67. The States' immunity from private suits brought under Article I, however, is neither limited to federal court actions nor restrained by the Eleventh Amendment. That constitutional provision merely "confirmed rather than established sovereign immunity as a constitutional principle." *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). Congress cannot use its Article I powers to strip the States of their immunity from claims brought by a private party in any forum without their consent because, "as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713.

The United States' brief reflects a critical misunderstanding of this feature of the States' sovereignty, and the role that their immunity fulfills "in our system of federalism," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), in arguing that their immunity is implicated only when there is a "threat to a State's financial integrity." U.S. Br. at 13. While sovereign immunity is aimed in part at "the prevention of federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994); *see also Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997) ("The Eleventh Amendment protects the State from the risk of adverse judgments"), that is not its sole concern. Rather, on a more fundamental level, according the States immunity from suit "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146).

Thus, unlike defenses such as absolute or qualified immunity which are available only to government officials and immunize those individuals only from personal monetary liability, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985), the Eleventh Amendment, and the doctrine of sovereign immunity that it exemplifies, applies whenever any relief is sought from a State or one of its agencies, *see Seminole Tribe of Florida v. Florida*, 517 U.S. at 58; *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146; *Green v. Mansour*, 474 U.S. 64, 73-74 (1985); *Cory v. White*, 457 U.S. 85, 91 (1982); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and "necessarily embraces demands for the enforcement of equitable rights and the prosecution of

equitable remedies when these are asserted and prosecuted by an individual against a State." *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

The Court has underscored the unique status of the States' sovereign character in recognizing that their immunity embraces an "immunity from suit" and not "merely a defense to liability," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 145, and holding that an order denying a motion to dismiss based on Eleventh Amendment immunity grounds is immediately appealable because, among other reasons, "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice." *Id.* (footnote omitted). Court orders denying motions asserting absolute and qualified immunity are also immediately appealable, *see Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982), but the Court has limited interlocutory appeals in those cases to instances in which the denial of immunity "turns on an issue of law," *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. at 530), and does not raise a "question of 'evidence sufficiency.'" *Johnson v. Jones*, 515 U.S. 304, 311-12 (1995). In the context of the States' sovereign immunity, however, the Court has stated that it sees "little basis for drawing such a line." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 147.

Perhaps more significantly, while an appellate court may refuse to consider other immunity defenses when not made at the trial level, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Indeed, the Court has stated that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power

of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467 (1945). The Court has thus recognized time and again, in a variety of contexts, that the doctrine of State sovereign immunity is not concerned solely with the threat to their "financial integrity" (U.S. Br. at 12, 13, 21) but rather has a broader sweep than any other immunity defense recognized at common law because the States are not "mere prefectures or corporations," *Alden v. Maine*, 527 U.S. at 758, but are instead to be treated by Congress "in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748.

The States' immunity "spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting). This "fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), however, is significantly compromised by the United States' argument that applying sovereign immunity "principles in any subsequent court proceeding adequately protects the State's ultimate authority to allocate public resources in the manner it sees fit," U.S. Br. at 21, since by that time the value to the States of their immunity "is for the most part lost. . . ." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 145. That value is entirely lost, and the federal-state balance loses all equilibrium, under the Federal Maritime Commission's position that sovereign immunity does not "preclude Congress from requiring the Commission to adjudicate a private person's complaint that a state-run

marine terminal has violated the Shipping Act." FMC Br. at 8.

As the court of appeals in this case stated, such a proceeding "would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment." Pet. App. 13a. While Article I administrative agencies did not exist at the time of the constitutional debates, the concept of jurisdiction was well-established, and "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). The type of claims at issue in this case would not have been excepted from this bedrock rule when the States ratified the Constitution, as the very notion of "jurisdiction implies superiority of power," *Alden v. Maine*, 527 U.S. at 715 (quoting 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765)), and the Constitution's ratification was not intended to disturb the "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution – anomalous and unheard of when the constitution was adopted." *Hans v. Louisiana*, 134 U.S. at 18.

The States did not intend to renounce this significant feature of their sovereignty when they ratified the Constitution. On the contrary, quoting from a leading Supreme Court historian, this Court in *Edelman v. Jordan*, 415 U.S. 651, 660 (1974), observed that "[t]he right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution

was finally adopted." (Quoting 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 91 (Rev. ed. 1973).) While that debate specifically addressed the proposed Article III clause defining the scope of federal judicial power, and thus "concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts," *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979), the debate's underlying theme involved the more general question whether the Constitution altered the sovereign right of the States not to be subjected to any compulsory process at all without their consent.

The Federal Maritime Commission argues much too narrowly, therefore, that "there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint," FMC Br. at 27 (emphasis in original), as "the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity." *Alden v. Maine*, 527 U.S. at 741. Indeed, in asserting to those opponents that the States' ratification of the Constitution would not have such an effect, Alexander Hamilton acknowledged that the "plan of the convention" identified "circumstances which are necessary to produce an alienation of State sovereignty," The Federalist Papers, No. 81, at 487, 488 (C. Rossiter ed. 1961), but stressed that "there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.* at 488.

The Federal Maritime Commission's reliance on one of those "circumstances" – *i.e.*, where the Constitution "granted an authority to the Union, to which a similar

authority in the States would be absolutely and totally contradictory and repugnant," FMC Br. at 31 (quoting The Federalist No. 32, at 198) – is thus no proof at all that the Constitution gave Congress the power to authorize private citizens to file complaints against the States in any forum. On the contrary, as Hamilton asserted after stating that the Constitution would in some instances necessitate a surrender of sovereignty, "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81, at 488.

In light of passages such as these, the Federal Maritime Commission misstates the central inquiry in this case in asserting that "the Constitution does not *explicitly* preclude federal regulation through reliance on administrative adjudications initiated by private persons against state entities." FMC Br. at 27 (emphasis in original). The question is not whether the States can prove that the Constitution incorporates the doctrine of sovereign immunity – although *Alden v. Maine* confirms that they have and it does – but rather whether those challenging that immunity can provide clear and unequivocal proof that the States agreed to relinquish or qualify in any way their pre-existing right not be sued when they ratified the Constitution. The statements of one of the leading Framers quoted above strongly support the conclusion that the States did not do so, and certainly contain nothing that approaches clear and unambiguous proof that they did. Conversely, neither the Federal Maritime Commission nor the United States has come forward with any "persuasive evidence that the founding generation regarded the States' sovereign immunity as defeasible by federal statute." *Alden v. Maine*, 527 U.S. at 733. As *Alden* illustrates, precisely the opposite understanding existed.

B. The States' Dignity Is Violated By Coercing Their Participation As Defendants In A Federal Administrative Proceeding.

There is little doubt what the States' reaction would have been had they been told that their ratification of the Constitution would have given Congress the authority to make them unwilling participants in the kind of compulsory process that is triggered when a private party files a complaint under the Shipping Act. While the Commission "may investigate any conduct or agreement that it believes may be in violation of" the Act, 46 U.S.C. app. 1710(c), the Commission "shall" conduct an entirely separate procedure when a person claiming a violation of the Act files with the Commission a sworn complaint alleging a violation of the law. *See* 46 U.S.C. app. 1710(a). The latter procedure, according to the Commission's own regulations, may result in "coercive rulings such as payment of reparation or cease and desist orders." 46 C.F.R. § 502.68(b). Despite the efforts of the United States and the Commission to characterize such rulings as mere regulatory action, even a casual reading of the Shipping Act and the Commission's regulations reveals that these rulings are obligatory in nature and the product of a mandatory process initiated by a private party in which a State must "defend or default . . ., by federal fiat and against its will." *Alden v. Maine*, 527 U.S. at 749.

Adjudicatory proceedings before the Commission are initiated either when the Commission issues an order to show cause or a private party files a complaint with the Commission. *See* 46 C.F.R. §§ 502.61(a), 502.66. While the Commission's Director of the Bureau of Enforcement shall be a party in proceedings initiated by a show cause order, "in complaint proceedings under § 502.62, the Director may become a party only upon leave to intervene granted pursuant to § 502.72." 46 C.F.R. § 502.42. Such

leave is granted sparingly. *See* 46 C.F.R. § 502.72(b). The Commission acknowledges, moreover, that "the agency does not have adequate resources to investigate on its own motion all possible statutory violations," FMC Br. at 37, and so it is "necessary for private persons operating in maritime commerce to file complaints in order to ensure that Shipping Act rights are enforced and vindicated." *Id.*

Those complaints "must be verified," 46 C.F.R. § 502.62(a), and served on the party against whom it is filed, either by the Commission, *id.*, § 502.113(a), or the complaining party. *Id.*, § 502.113(b). The subject of the complaint, known as the respondent, *id.*, § 502.64(a), "shall" file an answer with the Commission and serve it on the complainant, usually within twenty days, and "[i]n the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just." *Id.*, § 502.64(b). The Shipping Act also provides that "depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States." 46 U.S.C. app. 1711(a)(1). The Commission "may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence." *Id.*, § 1711(a)(2).

Formal complaints are referred to the Office of Administrative Law Judges, *see* 46 C.F.R. § 502.61, which assigns an administrative law judge to hold a hearing and render a recommended or initial decision. *Id.*, § 502.223. In the course of preparing for such a hearing, the parties are authorized to conduct discovery, *see id.*, § 502.201, including written and oral depositions, *id.*, §§ 502.202 - .204; interrogatories, *id.*, § 502.205; requests for production of documents and to obtain permission for "entry upon

designated land or other property in the possession or control of the party upon whom the request is served," *id.*, § 502.206(a); and requests for admission. *Id.*, § 502.207. A matter is deemed "admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney." *Id.*, § 502.207(a)(2)(ii). The Commission's regulations also provide that "[a]ny matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment." *Id.*, § 502.207(b).

The presiding officer or administrative law judge also has authority to exercise a range of other functions and powers, including signing and issuing subpoenas, taking or causing depositions to be taken, ruling on proposed pleading amendments, delineating the scope of the proceeding, prescribing the order in which evidence is presented, resolving procedural requests and motions, ruling upon offers of proof and receiving evidence, hearing oral argument, scheduling the submission of written briefs and other documents, and disposing of other matters that typically arise in the course of an evidentiary hearing. *See* 46 C.F.R. § 502.147.

The United States is wrong, therefore, that subjecting an unconsenting State to this process "does not cause the affront to state dignity that might be thought to follow from judicial proceedings whose underlying purpose is the vindication of a private right." U.S. Br. at 24. It offends "the States' dignitary interests," *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146, to suggest that a State might "choose to ignore" (U.S. Br. at 28) (quotations omitted) such a process, and to infer that the States believe they have some kind of "right to disregard the Constitution or valid federal law" and to "refuse to honor

the Constitution or obey the binding laws of the United States." *Alden v. Maine*, 527 U.S. at 755. It is also simply not credible to argue that the core concerns underlying the doctrine of sovereign immunity are not implicated when the States, as unwilling defendants, are hauled into what few would dispute is a "coercive process . . . at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), and are subjected to "coercive rulings." 46 C.F.R. § 502.68.

In arguing that neither the administrative law judge nor the Commission "exercises judicial power," FMC Br. at 20, as described in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and that a complaint-initiated proceeding before the Commission does not constitute a "suit" as that word "has traditionally been used," U.S. Br. at 15, the Federal Maritime Commission and the United States "engage in the type of ahistorical literalism" that this Court has time and again "rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisolm* [*v. Georgia*, 2 Dall. 419 (1793)]." *Alden v. Maine*, 527 U.S. at 730. The federalism concerns that underlie the States' immunity, and that the Constitution strives to balance, are not limited solely to, or triggered only by, suits brought by citizens of other States, *Hans v. Louisiana*, 135 U.S. 1 (1890), or actions brought "in law or equity," *Ex parte New York*, 256 U.S. 490 (1921), or cases filed in federal court, *Alden v. Maine*, but rather are jeopardized whenever Congress authorizes an individual to file a complaint against a State that triggers an adversarial process which can result in a ruling awarding relief against the State and in favor of the individual.

Although these federalism concerns were disregarded in *Chisolm v. Georgia* in favor of a literalistic reading of Article III, the decision was met with universal disapproval, with the result that the Eleventh Amendment was quickly

ratified thereafter so that it "established in effective operation the principle asserted by Madison, Hamilton and Marshall in expounding the Constitution and advocating its ratification." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). In establishing "[a] state's freedom from litigation . . . as a constitutional right," *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944), the Eleventh Amendment confirmed the impropriety in subjecting a State to any complaint filed against it by a private party, regardless of the forum.

Indeed, it makes little sense to acknowledge that the views of the leading Federalists "were clearly right, as the people of the United States in their sovereign capacity subsequently decided," *Hans v. Louisiana*, 134 U.S. at 14, by ratifying the Eleventh Amendment in the wake of *Chisolm v. Georgia*, but then to ignore those views when the States are subjected to the type of compulsory process at issue in this case. It would be a strange and hollow protection promised the States if it is beyond the power of the Constitution to override their immunity in federal court, because that would result "in destruction of a pre-existing right of the State governments," The Federalist No. 81 (Hamilton), at 488, but to hold that the abrogation of a functionally identical immunity in another federal forum involving a virtually identical coercive process would not "involve such a consequence," *id.*, and thus would be constitutionally proper. The literalistic approach of the Federal Maritime Commission and the United States that confines the States' immunity to judicial proceedings and exercises of judicial power simply cannot be reconciled with the broader understanding of State sovereignty and dignity that existed when the Constitution was adopted.

C. The States' Consent To Suit By The United States Does Not Vest Congress With Authority To Abrogate The States' Immunity From A Complaint Filed By A Private Party With A Federal Administrative Agency.

While the Federal Maritime Commission argues that "[t]he practical effect of the court of appeals' decision is to prevent the Commission from administering the Shipping Act," FMC Br. at 11, holding that the private party complaint in this case is barred by immunity does not render the Act unenforceable. In ratifying the Constitution, the States have been deemed to consent to suits brought by the United States. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 644-45 (1892). "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. at 329. Although the Shipping Act does not contain "a statutory provision authorizing private suit against a State," *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 781 n.9 (2000), the Act authorizes the United States to initiate a case against the States. *Id.* (citing *California v. United States*, 320 U.S. 577, 585-86 (1944)). *See also* 46 U.S.C. app. 1710(h)(1) ("the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter"). The Commission's concern that its jurisdiction will be divested by a decision upholding South Carolina's immunity thus "wholly disregards" this "other method[] of ensuring the States' compliance with federal law." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 71 n.14.

That method was not chosen here, however, as this proceeding was not initiated by the Commission, apparently because it did "not have adequate resources," FMC Br. at 37, but rather by a private party seeking injunctive relief,

reparations, and attorney's fees. *See* Joint Appendix at 14-16. Congress does not have the power under Article I to authorize citizens to seek such relief from the States. Even when a federal agency has authority to investigate and file suit against the States for violations of federal law the agency is entrusted to administer, Congress nevertheless lacks the authority to abrogate the States' immunity in suits brought against them by private parties under the same law. The Equal Employment Opportunity Commission, for example, can sue the States, but "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). *Accord* U.S. Br. at 21 ("Because the Eleventh Amendment would preclude a district court from exercising jurisdiction over a nonconsenting State in an enforcement action brought by a private party, the FMC's determination that a state entity has violated the Shipping Act cannot be used in furtherance of a private suit for monetary relief.").

Nor does Congress have the power to authorize private parties to file complaints against the States as a "substitute for agency-initiated investigations of prohibited conduct." FMC Br. at 37. Regardless of whether an "administrative agency adjudicates private complaints as part of a larger regulatory mission," U.S. Br. at 21, or whether "[t]he right to file a complaint with the Commission is a public right," FMC Br. at 9-10, the States' consent to be sued by the United States is not transferrable to a private party. On the contrary, this Court in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), expressed "doubt" whether the "Federal Government's exemption from state sovereign immunity . . . can be delegated," *id.* at 785, and stated even greater skepticism about the delegation question in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* in which, after stating that "a *qui tam* relator is, in effect,

suing as a *partial* assignee of the United States," 529 U.S. at 773 n.4 (emphasis in original), the Court declared that it would "express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'serious doubt' on that score." *Id.* at 787 (citing *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

Unlike in *Vermont Agency of Natural Resources*, a private party that files a complaint against a State with the Federal Maritime Commission acts as a *total* assignee of the United States. The States did not consent to such an assignment, as "[t]he consent, 'inherent in the convention,' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select." *Blatchford v. Native Village of Noatak*, 501 U.S. at 785. On the contrary, "even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." *Id.*

It is thus insufficient, as the United States argues, that the Commission's adjudication of a private complaint is "simply one means by which the agency fulfills the responsibility of the Executive Branch to 'take Care that the Laws be faithfully executed.'" U.S. Br. at 23 (quoting U.S. Const. Art. II, § 3). Addressing the same constitutional language quoted by the United States, this Court in *Alden v. Maine* reiterated what it stated in *Blatchford*, namely, that the United States' exercise of such a responsibility "differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity." 527 U.S. at 755-56. The

United States thus misses the point in asserting that "an adjudication forms part of the agency's responsibility to enforce the law," U.S. Br. at 23, as "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Alden v. Maine*, 527 U.S. at 756. Immunity applies here because the federal government did not exercise any political responsibility for this proceeding.

D. Immunity Also Bars The Request For Reparations Because Such Relief Can Only Be Requested By And Awarded To Private Parties, And Reparation Orders Can Only Be Enforced In A Federal District Court Action That The Eleventh Amendment Prohibits.

Even if the Federal Maritime Commission rather than a private party initiated this proceeding and thus satisfied the "rule that the National Government must itself deem the case of sufficient importance to take action against the State," *Alden v. Maine*, 527 U.S. at 759-60, the request for reparations would still be barred by immunity. The Shipping Act provides that private litigants may seek a reparations award by filing with the Commission a complaint alleging a violation of the Act and a request for "reparation for any injury caused to the complainant by that violation." 46 U.S.C. app. 1710(a). The Act also provides that "the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury . . . caused by a violation of this chapter plus reasonable attorney's fees." *Id.*, § 1710(g). "In case of violation of an order of the Commission for payment of reparation, the person to whom the award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties." *Id.*, § 1713(d)(1).

No similar authorization exists, however, for the Commission to seek or obtain this type of monetary relief. Indeed, while Congress has authorized the Commission to investigate possible violations of the Shipping Act "upon its own motion," 46 U.S.C. app. 1710(c), and to bring suit in federal district court "to enjoin conduct in violation of this chapter," *id.*, § 1710(h)(1), the Commission may order reparations only "upon petition of the complainant and after notice and hearing," *id.*, § 1710(g), and has no authority to file suit in federal district court to enforce any reparations award it has made. Thus, reparations may not be awarded unless they are requested by a private party in a complaint filed with the Commission, and they cannot be made to or judicially enforced by anyone other than the private party. Conversely, no reparations order can be issued unless reparations are sought in a complaint that a private party files with the Commission, which has no authority to seek judicial enforcement of such an order. Neither the request for a reparations award, the entry of a reparations order, nor the filing of a federal court action to enforce such an award can be squared with the command of the Eleventh Amendment that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity" brought against a State by a private party.

The request for reparations would be barred by immunity even if this were a Commission-initiated proceeding, as the United States' presence would "not eliminate the State's immunity for all purposes." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103 n.12 (1984). In rejecting the States' Eleventh Amendment immunity defense against the claims of several Indian tribes who intervened in a case in which the United States was a party, the Court in *Arizona v. California*, 460 U.S. 605 (1983), pointed out that the tribes did "not seek to bring new claims or issues against the states" and so "our judicial power over

the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* at 614. Such a compromise of immunity would exist in this case, however, because the Federal Maritime Commission may seek only injunctive relief against a State, and only a private party may seek reparations. Thus, "the fact that the federal court could award injunctive relief to the United States . . . would not mean that the court could order the State to pay damages to other plaintiffs." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 103 n.12. Rather, as the United States concedes (U.S. Br. at 21), the Eleventh Amendment would bar such relief.

This is not a Commission-initiated proceeding, however, and so the court of appeals properly ordered the entire case dismissed. That dismissal is not, from a constitutional perspective, "inconsistent with the requirement of national uniformity in the regulation of maritime commerce." FMC Br. at 33. Such an Article I regulatory interest does not override the States' immunity even when "the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government," and "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area." *Seminole Tribe*, 517 U.S. at 72. The court of appeals thus correctly held that sovereign immunity bars a complaint filed with the Federal Maritime Commission by a private party seeking monetary and injunctive relief against an unconsenting State for purported violations of the Shipping Act.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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